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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

THE PULLMAN COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States and the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.[1]

OPINIONS BELOW

The opinion on rehearing (App. B, *infra*, p. 29) and the original opinion of the court of appeals (App. A, *infra*, p. 15) are not yet officially reported. The opinion of the district court (App. E, *infra*, p. 39) is not officially reported.

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[1] Earl A. Love, plaintiff below, has also filed a petition seeking review of this decision (No. 6018, this Term). Should the petitions be granted, the Court may wish to consolidate the cases.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on July 30, 1970 (App. D, *infra*, p. 37). On October 27, 1970, Mr. Justice White extended the time for petitioning for a writ of certiorari to November 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under Section 706(b) of Title VII of the Civil Rights Act of 1964, "no charge" of discrimination "may be filed" with the United States Equal Employment Opportunity Commission until it has been filed with a state agency empowered to seek relief from employment discrimination, if one exists, and 60 days have expired or the state agency has terminated its jurisdiction, whichever is earlier. If EEOC is unable to conciliate the charge, Title VII authorizes the private party to file suit.

The question presented is whether a district court is without jurisdiction to entertain a suit alleging racial discrimination in employment in violation of Title VII because the Equal Employment Opportunity Commission, after receiving a written charge from the complainant, referring it to the appropriate state fair employment practices commission and waiting until that agency had terminated its jurisdiction, investigated the original charge without immediately obtaining an additional written charge or authorization from the complainant.

STATUTE AND REGULATIONS INVOLVED

Section 706(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(b)), states in part:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated * * *.

Section 706(d), 42 U.S.C. 2000e–5(d), states in part:

> A charge * * * with respect to which the person aggrieved has followed the procedure set out in subsection (b), of this section, * * * shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings * * * whichever is earlier * * *.

The pertinent present regulation of the Equal Employment Opportunity Commission, 29 C.F.R. 1601.12, provides:

> (a) In order to give full weight to the policy of section 706(b) of the Act which affords State and local fair employment practice agencies that

fall within the provisions of that section an opportunity to resolve disputes involving alleged discrimination concurrently regulated by Title VII of the Civil Rights Act of 1964 and State or local law, the Equal Employment Opportunity Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to the State or local agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to the State or local agency as is permitted by law and is practicable. It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights.

(b) The following procedures shall be followed with respect to cases arising in the localities to which the Commission defers:

(1) Any document, whether or not verified, filed at any field office of the Equal Employment Opportunity Commission or at Washington, D.C., which may constitute a charge cognizable under title VII, shall be deferred to the

appropriate State or local agency pursuant to the procedures set forth below.

(i) All such documents shall be date and time stamped on receipt.

(ii) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate State or local agency.

(iii) The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(b), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within 60 days of the date of receipt of the document without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

(iv) The sixty-day period shall be deemed to have commenced on the receipt of the document by the State or local agency as evidenced by the date indicated on the return receipt. On notification of termination of State proceedings or the expiration of 60 days, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case .

* * * * *

The regulation in effect at the time the charge in this case was lodged with the Equal Employment Opportunity Commission (30 Fed. Reg. 8408) provided:

> In any instance in which an aggrieved person seeks to file a charge and it appears from the charge or from other information that the aggrieved person has not begun proceedings before a State or local authority pursuant to section 706(b) of Title VII, the Commission may not accept the charge of filing, but shall assist the aggrieved person in complying with section 706(b).

STATEMENT

This suit was brought by Earl A. Love, a black man, against respondent Pullman Company for refusing to promote him to the position of "conductor." An employee of respondent for approximately forty-five years, Mr. Love alleged he was performing the duties of a conductor under the job title of "porter-in-charge," an all-Negro classification, and that he had not been promoted to the higher paying position of conductor because it was restricted to whites.

Mr. Love initially filed a written charge of discrimination with the Colorado Civil Rights Commission in 1963. Apparently, no action was taken. He renewed his complaint orally to the same office in 1965. By letter of July 30, 1965, the Colorado Commission advised Mr. Love that the company offered to make him a conductor but without seniority. Mr. Love declined the offer because of the lack of job security which would result from loss of his seniority.

Mr. Love wrote to the Equal Employment Opportunity Commission on May 23, 1966, again alleging that he was being denied the higher pay and other benefits of a conductor because of his race. The EEOC informed the Colorado Commission that the charges were apparently within the latter's jurisdiction. On June 1, 1966, the Colorado Commission, by letter, declined to assume jurisdiction, specifically waived the 60-day requirement of Section 706(b), and asked the EEOC to proceed. EEOC then began a formal investigation without further communication with Mr. Love. On July 23, 1966, Mr. Love signed a formal charge on an EEOC form.

The Commission subsequently found cause to believe that there was discrimination on the part of respondent. Its efforts at conciliation were not successful, however, and it advised Mr. Love on May 3, 1968, that he had thirty days in which to bring suit. He filed suit on May 28, 1968.

The district court granted respondent's motion for summary judgment on the ground that Mr. Love had allowed the statute of limitations to run by not filing a complaint with the EEOC within thirty days of July 30, 1965, the date of the letter from the Colorado Commission to him. (App., *infra,* p. 42). The court of appeals, Senior Judge Fahy dissenting, affirmed, adding, as a separate ground for EEOC's lack of jurisdiction, the fact that the complaint had not been refiled with the EEOC after being referred to the state commission (App. *infra,* pp. 20–23).

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Mr. Love moved for rehearing *en banc*. The United States and the EEOC each intervened in support of the motion. The petition for rehearing was referred to the original panel. It held that its original decision was erroneous insofar as it rested on the failure of Mr. Love to file a complaint with the EEOC within 30 days of the state commission's letter of July 30, 1965, since the discrimination complained of took place prior to the effective date of the Act (July 2, 1965). The court, however, reaffirmed its decision on the second ground. It held that the letter of May 23 could not serve as a complaint to the EEOC, since it had not then been filed with the state commission; that it did not toll or suspend the 30-day period of limitations of Section 706(d), which began to run on June 1; and that the EEOC was without authority to treat it as filed on or after June 1 "without further word or act by the complainant" (App., *infra*, p. 33).[2] While the court did not discuss the formal charge filed by Mr. Love on July 23, after the statute of limitations had run, it apparently considered this defect jurisdictional, even as to discrimination of a continuing character.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals potentially affects more than one-fourth of the charges annually filed with the Equal Employment Opportunity Commission, including many that are presently pending

[2] The court stated that the Commission's regulations at that time "did not contemplate or permit such manipulation of the filing date," and said that in any event such a filing procedure could not "be regularized by the adoption of regulations" (App., *infra*, p. 32).

before the Commission, and could thus seriously impair the rights of numerous individuals to enforce the equal employment opportunity provisions of Title VII of the Civil Rights Act by private suit. The holding is, moreover, in conflict with the rationale of the Court of Appeals for the Third Circuit in a closely analogous situation. Review by this Court is needed to clarify the procedural requirements of Title VII in order to protect the rights of complainants to have their claims adjudicated on the merits.

1. From the time that Title VII became effective, many complainants have filed charges of racially discriminatory employment practices initially with EEOC rather than the appropriate state agency. The Commission has consistently referred these complaints to the state agency and, after waiting until expiration of the 60-day statutory period (or until the state agency terminated its proceedings, if earlier), has then accepted the complaints for formal filing. For the first 3 years, EEOC usually (but not always) wrote to the charging party at this time to determine whether he wanted it to assume jurisdiction. Since November 1968, the Commission regulation (*supra*, pp. 3–5) has provided that it will automatically assume jurisdiction over these charges after the expiration of the deferral period.

The original opinion of the court of appeals appeared to prohibit altogether EEOC's practice of retaining a copy of the charge and treating it as filed after the deferral period. The opinion on rehearing stressed the fact that EEOC had accepted the present

charge for filing "automatically" after receipt of the Colorado Commission's letter declining jurisdiction "without further correspondence" from the charging party (App., *infra*, p. 32). At a minimum, therefore, the rationale of the court of appeals applies to all charges received initially by EEOC, from complainants in states having enforcement agencies,[3] after the effective date of the November 1968 regulations.[4] More than 7,000 such complaints have been filed since that time.[5]

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[3] There are state fair employment agencies in at least 30 states, including California, New York, Ohio and Illinois. Approximately 25 percent of all charges are initially filed with it instead of with the state commission.

[4] At the time of the writing of this petition, the Senate had passed S. 2453, which, among other things, amends the language of Section 706(b) to delete the term "no charge may be filed," in order to clarify congressional intent that the Commission may receive the charge, but may not take action with respect to it until the prescribed period has elapsed. S. Rep. 91-1137, 91st Cong., 2d Sess., pp. 22, 43. Section 11 of this bill provides, however, that "[t]he amendments * * * shall not be applicable" to pending charges. See 116 Cong. Rec. (daily ed., October 1, 1970) S 16917.

[5] The courts of appeals for the Fifth and Seventh Circuits have recently held that district courts have jurisdiction over suits involving employment discrimination under 42 U.S.C. 1981, notwithstanding the complainant's failure to follow the procedure prescribed in Title VII. *Sanders* v. *Dobbs House, Inc.*, 2 FEP Cases 942 (C.A. 5, No. 29029, August 28, 1970); *Waters* v. *Wisconsin Steel Workers*, 2 FEP Cases 574 (C.A. 7, No. 17895, April 28, 1970). It is therefore not clear that these complainants would lose all of their judicially enforceable rights with respect to the alleged discriminatory practices of which they complain. Regardless of whether complainants retain the right to sue, the decision below, by depriving EEOC of jurisdiction, frustrates the congressional intent that EEOC be afforded an opportunity to conciliate prior to the filing of suit.

2. The Commission's practice of referring charges initially lodged with it to the appropriate state agency and then treating them as "filed" after the expiration of the deferral period properly implements the policies and requirements of Title VII. The Commission's function is to investigate and conciliate charges of discrimination, but only after the state agencies have had a reasonable time within which to remedy the alleged discrimination. See 110 Cong. Rec. 12725 (Sen. Humphrey). As Judge Fahy emphasized in his dissent below, the people whom Title VII is designed to help and whose complaints are relied upon to trigger the enforcement process are largely working men who cannot be expected to know the procedural intricacies of Title VII. EEOC's complaint-filing practice justly accommodates the states' interest under Title VII in having first opportunity to cure discrimination with the basic congressional purpose to vindicate individual rights against discrimination (App., *infra*, p. 27).

The only other appellate ruling on EEOC's complaint-filing procedure, *International Brotherhood of Electrical Workers, Local 5* v. *EEOC*, 398 F. 2d 248 (C.A. 3), certiorari denied, 393 U.S. 1021, essentially conflicts with the ruling below. In that case, as here, the complainant wrote initially to the EEOC. The Commission advised the state agency of the charge and after that agency allowed 60 days to pass without taking final action, treated the charge as having been formally filed with it. The complainant thereafter filed a "formal charge" on an EEOC form more than thirty days after the state agency had concluded its

proceedings. The court ruled that the letter was not "a valid charge when received" by EEOC because it had not been sent to the state agency, but that this defect was cured and the letter became an effective charge after it was referred to the agency and the deferral period expired. 398 F. 2d 248, 252.

The majority of the court below ruled that the *International Brotherhood of Electrical Workers, Local 5* case was distinguishable because the EEOC there had sought and received a reauthorization from the charging party before proceeding with its investigation (App., *infra*, p. 32). Formal reauthorizations are generally without practical consequence, however, for EEOC's practice is to interview the complainant prior to commencing any investigation. Thus, if he does not wish to proceed, he can withdraw his charge at this time. In the present case, of course, the initial interview was unnecessary. Mr. Love had complained to EEOC just seven days before it assumed jurisdiction. The state agency refused to consider the complaint and took no other action. There was thus no basis to believe that there had been any change in circumstances during the brief interval between referral to the state agency and termination of its proceedings which would cause Mr. Love to wish to withdraw the complaint for which he initially sought the help of EEOC.

3. The court's implicit ruling that the 30-day statute of limitations under Section 706(d) deprived the district court of jurisdiction, even where the discrimination is of a continuing character, is also at odds with the generous attitude displayed by other courts

of appeals toward procedural irregularities in the filing of complaints with the EEOC.[6] It was not, moreover, required by the underlying policies for which statutes of limitations exist. There was no unfairness or prejudice to respondent, who had been aware of Mr. Love's charge of discrimination at least since 1965 when it made an offer of settlement to him; nor was there any lack of diligence on the part of Mr. Love. In a comparable situation, this Court held that the interests of vindicating rights of individuals outweigh the statute's policy of repose. *Burnett* v. *New York Central R. Co.*, 380 U.S. 424.

For these reasons, as well as those previously stated, the court of appeals should have ruled that the initial defective filing with the EEOC was later cured by referral to and waiver of jurisdiction by the state agency, and that it tolled the statute of limitations.

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[6] See *Sanchez* v. *Standard Brands*, 2 FEP Cases 788 (C.A. 5, No. 27730, July 1, 1970) (incomplete or erroneous statement of charges with EEOC can be amended after expiration of the limitations period); *Culpepper* v. *Reynolds Metals Company*, 421 F.2d 888 (C.A. 5) (pursuit of remedies available under the collective bargaining agreement is sufficient to toll the statute of limitations for filing charges with EEOC under Title VII); see, also, *Georgia Power Co.* v. *EEOC*, 412 F.2d 462 (C.A. 5); *Miller* v. *International Paper Co.*, 408 F. 2d 283 (C.A. 5); *Johnson* v. *Seaboard Air Line R.R. Co.*, 405 F. 2d 645 (C.A. 4), certiorari denied *sub nom. Pilot Freight Carriers, Inc.* v. *Walker*, 394 U.S. 918; *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1970.

APPENDIX A

United States Court of Appeals
Tenth Circuit

AUGUST 1969 TERM

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

No. 226–69

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-CROSS APPELLANT

v.

EARL A. LOVE, PLAINTIFF-CROSS APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (DISTRICT COURT NO. C-899)

Hugh J. McClearn, Denver, Colorado (Frederick Miles, and Van Cise, Freeman, Tooley & McClearn, Denver, Colorado, with him on the Briefs), for Appellant and Cross-Appellee.

Edward C. Eppich, Denver, Colorado (Neef, Swanson, and Myer, Denver, Colorado, with him on the Brief), for Appellee and Cross-Appellant, The Pullman Company.

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Marian Halley, Attorney, Washington, D.C. (Daniel Steiner, General Counsel, and Russell Specter, Assistant General Counsel, with her on the Brief), for United States Equal Employment Opportunity Commission, as Amicus Curiae.

Before FAHY, Senior Circuit Judge*, LEWIS and SETH, Circuit Judges.

SETH, Circuit Judge.

Appellant brought suit pursuant to 42 U.S.C.A. § 2000e–5(f), a portion of Title VII of the Civil Rights Act of 1964, alleging that he was discriminated against in employment because he was a Negro. The appellee moved to dismiss the complaint on the ground that the charge was not timely filed with the Equal Employment Opportunity Commission and that appellant's cause of action was moot. The trial court treated appellee's motion as a motion for summary judgment, and granted it. This appeal was then taken. The Equal Employment Opportunity Commission has filed a brief as amicus curiae.

Appellant was employed by the appellee for more than forty years as a Pullman porter. He resigned from this position in November 1968. In 1951 the appellant was classified and began to perform the duties of a "porter in charge." Appellant states that the duties of a porter in charge are for all purposes identical to those of a Pullman conductor, and that porters in charge must at all times be available to

*Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

work as such a conductor. Porters in charge however receive substantially lower wages than do conductors.

In his suit, appellant asserts that he has been restricted to the classification of porter in charge because of his race and that the classification of conductor is primarily an all-white classification from which Negroes were excluded.

The trial court found that in 1963 the appellant filed a written charge of discrimination with the Colorado Civil Rights Commission and that in 1965 he orally restated his complaint to that same commission. The court found also that this oral statement did not literally comply with the Colorado statute governing the same, but it was substantial compliance. The court found that the appellant's case was thereby reopened in 1965, but the commission was unable to reach an arrangement with The Pullman Company that was satisfactory to the appellant. The company advised the commission they would promote the appellant to conductor, but by reason of the union contracts he would be very low in seniority as a conductor and that he would probably be laid off. The commission so advised the appellant by letter. This was found by the trial court to have terminated the proceedings on appellant's complaint in July 1965.

Thereafter, on May 23, 1966, appellant sent a letter of complaint to the Equal Employment Opportunity Commission (EEOC) in Washington making the same complaint that he had to the Colorado commission. When the EEOC received appellant's letter it, in some way undisclosed in the record, informed the Colorado commission that it had received a charge of discrimination which appeared to be within the jurisdiction of the Colorado commission. By letter of June 1, 1966,

the Colorado commission advised the EEOC that in light of its prior contacts with the appellant and his failure to return to file a complaint, the commission would not "accept" the sixy day deferment period, waived it, and asked the EEOC to proceed.

The EEOC then served a copy of the charge on the appellee and began an investigation. A charge on an EEOC form signed by appellant dated July 23, 1966, also appears in the record, and we assume this supplemented his original letter of May 23, 1966.

A "Final Investigative Report" by a Regional Director of the EEOC found no violation of Title VII. He instead found that the Sleeping Car Porters Union and The Pullman Company were in violation of the Act by reason of their union contract. He recommended that a commissioner's charge be brought on this basis. The commission thereafter found otherwise and issued its Decision that there was instead reasonable cause to believe that there was discrimination. On May 3, 1968, the EEOC notified the appellant that it had been unable to secure the appellee's voluntary compliance with Title VII and that the appellant had thirty days in which to bring suit.

The appellant then duly filed a complaint and later an amended complaint on behalf of himself and of all persons similarly situated who had suffered from the appellee's alleged discriminatory employment practice. The appellant also prayed that appellee be enjoined from classifying its employees on the basis of race and sought back pay for himself and for the class of persons situated as himself in the amount of the difference between the wages they had earned and what they would have earned but for appellee's discrimination.

The trial court in granting summary judgment in favor of the appellee ruled that since the Colorado

Civil Rights Commission had terminated its proceedings on appellant's complaint on July 30, 1965, and inasmuch as appellant did not file his charge with the EEOC until May 23, 1966, or more than thirty days after termination, appellant had failed to comply with section 706(d) [42 U.S.C.A. § 2000e–5(d)].

The trial court also ruled that since the appellant had resigned from employment with the appellee in November 1968, his request for injunctive relief was moot.

We must affirm the trial court on the timeliness of filing issue, and to thereby give effect to the time limits expressed in the statute.

It is clear that the Colorado Civil Rights Commission acts under a Colorado statute prohibiting the employment practice alleged and establishing state authority to grant or seek relief all as contemplated in section 706(d) of the 1964 Civil Rights Act [42 U.S.C.A. § 2000e–5]. Since the Colorado statute and the State commission so come within the terms of section 706(b) of the Act, no charge can be filed with the EEOC under section 706(a) until after the expiration of sixty days after proceedings are commenced in the State, unless the State proceedings terminate within such time. Further the Act in section 706(d) [42 U.S.C.A. § 2000e–5(d)] provides that filing with the EEOC must be made under these circumstances within two hundred ten days after the alleged unlawful employment practice occurred, "or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, * * *"

The trial court found, and the record shows, that the Colorado commission terminated its proceedings on plaintiff's complaint on July 30, 1965, and so noti-

fied him. We also agree that this second period of consideration was an effective reopening of prior proceedings on the same complaint. Thus if appellant had filed his complaint with the EEOC within thirty days thereafter there would be no question as to its authority to act on such a complaint. Appellant did not do so but waited until some time later and mailed a letter of complaint to the EEOC.

The appellant, and the EEOC as amicus curiae, argue here that this letter to the EEOC started a new chain of events, and they ignore the prior failure by appellants to comply with the time requirements. The EEOC, to sustain this position, urges that upon receipt of a complaint letter directly from an individual as the appellant here, it may hold it in some sort of suspense and "advise" the State commission concerned. Then at the end of the period the State has to consider complaints (sixty days) the commission can then automatically "assume jurisdiction," as if the complaint had been made directly to the State agency and, thereafter within the time limit, filed with the commission.

As indicated above, we must affirm the trial court in its holding that the time limit was ignored as to the complaint appellant himself filed with the Colorado commission. We also hold that the device used by the EEOC to start a new time sequence was ineffective to do so. Under the Act, when the appellant's letter to the EEOC was received it was thereby filed as the filing date cannot be manipulated by the commission. Its own regulations state "* * * a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." The charge was apparently definite enough for the EEOC

to advise the Colorado commission although the record does not show how this was done. The EEOC in its brief also states: "It is established beyond question that a charge, originally in the form of a letter, may later be reduced to proper form, and that the later official charge will relate back to the date of the letter." Thus the charge here concerned was filed when received, and at that time the EEOC had no authority over the matter because it had then not yet been presented to the Colorado commission.

In *International Bhd. of Elec. Workers* v. *United States Equal Employment Opportunity Comm'n,* 398 F.2d 248, the Third Circuit held that a charge when filed with the EEOC before the expiration of the State's sixty day period was not then valid. The same situation here prevails because appellant's charge was filed with the EEOC before Colorado had a chance to act on it. The court in *I.B.E.W.* however found a subsequent charge filed within the statutory time intervals and sequence was valid and within the two hundred ten day period.

The trial court in the case at bar also had no statutory power to hear the case because the EEOC also lacked such authority. The trial court so held. See *Washington* v. *Aerojet-General Corp.,* 282 F.Supp. 517 (C.D. Calif.), where the date of receipt and the date of filing were also considered.

The Civil Rights Act of 1964 is precise in its requirements that the States with adequate statutes and machinery have the first opportunity to consider complaints. This first opportunity is a clear requirement in the sequences set out in the Act. This opportunity cannot come by an advice from the EEOC that a complaint has already been filed with it. This practice seeks to channel complaints first to the EEOC which then "advises" the State agency, gives it sixty

days, and then the EEOC automatically proceeds. The statute does not contemplate this procedure.

In the case before us the record does not show what the EEOC advised the Colorado commission nor how it did so. We have only the Colorado commission's response. This response, as mentioned above, noted that appellant had requested nothing further of the State commission, indicated that appellant was perhaps disappointed in it, and asked the EEOC to proceed. This reference shows, of course, that the same complaint theretofore presented to the Colorado commission was recognized. Thus this is not an instance where the State agency was unfamiliar with the complaint. Its letter of June 1, 1966, indicates that appellant was expected to return. We don't of course know whether other action would have been taken had appellant returned to it and presented another complaint. The deposition of the State director only states that the policies were undergoing substantial changes at the time. After careful consideration we cannot on this record say that submission to the Colorado commission by appellant would have been wholly futile.

We must thus apply the procedure and the time limits set by Congress which are explicit in the statute. The language is clear and needs no interpretation. However, there were important reasons set out in the legislative history as to why the complaints must first be filed with the State agency when the State statute contains the required provisions. 110 Cong. Rec., part 10, 13008 and 12721 (1964), 88th Cong. 2d Sess. The debates in Congress include a variety of views as to several sections of the Act, especially the provisions relating to conciliation; however, the sequence of State and federal action was debated with little or no evidence of a difference of

opinion as to the meaning of the provisions proposed. It became a fundamntal issue, and the subject of a significant compromise; thus the legislative history is also clear if it need be considered.

The court in Equal Employment Opportunity Comm'n v. Union Bank, 408 F.2d 867 (9th Cir.), held that the mandate is evident that the claimant must first proceed "under available state law before filing a charge with the EEOC." The time limitation for filing with the EEOC follows to permit the federal agency thereafter to consider the matter. For reasons Congress fully considered, the reference of complaints to the federal agency comes after their consideration by the States. See also Edwards v. North American Rockwell Corp., 291 F.Supp. 199 (C. D. Calif.).

In order to preserve this stated sequence and the statutory thirty day period in which to invoke federal agency authority, the holding must be that the appellant waited too long after final State action to take the matter to the EEOC, and thus the federal agency did not have authority to act, nor did the trial court.

The sequence and the time period is applicable under the statute to all types of allegedly unlawful discrimination. It does not differentiate between continuing discrimination and isolated incidents. The familiar "continuing violation" argument advanced by appellant and the EEOC would permit a complaint to be initially filed with it at any time whatever as to a continuing offense, and the elements of the Act considered above would thereby be destroyed.

Affirmed.

FAHY, *Senior Circuit Judge,* dissenting.

As the court points out, the trial court found the reopened 1965 case was terminated by the State Com-

mission in July of that year. No complaint was filed with the Equal Employment Opportunity Commission within thirty days thereafter. It follows, I agree, that § 706(d) (42 USCA § 2000e–5(d)) was not complied with, insofar as the reopened 1965 case is concerned. However, on May 23, 1966, as the court also points out, appellant sent a letter complaint to EEOC. Since the discrimination of which he had complained to the State Commission, and now complained to EEOC, was of a character which continued to the time of the filing, this complaint, if it were handled so as to meet the procedural requirements of the Act, initiated a new case.

To recognize that some discrimination is of a continuing character is not to say that repetitious complaints or reopenings may be unlimited. An administrative agency, as well as a court, has the power to prevent abuse of its process. But I find no such abuse here, just as this court found none when it accepted as valid an oral renewal in 1965 of Love's formal complaint made before the State Commission in 1963. In fact, our court now comments that had appellant filed his present complaint with EEOC within thirty days after he was notified that his 1965 complaint to the State Commission was terminated "there would be no question as to the (EEOC's) authority to act on such a complaint." The court makes no mention, however, of the requirement in § 706(d) (42 USCA § 2000e–5(d)) that a valid complaint to EEOC, if a state commission has taken jurisdiction, must be made within 210 days after the alleged employment practice occurred or within 30 days after receiving notice of the termination of state proceedings, whichever is earlier. If Love's renewed complaint before the state

commission in 1965 was not justified by a continuing discrimination, any complaint to EEOC at this later time would clearly have been filed more than 210 days after the alleged unlawful employment practice which led to the 1963 complaint.

The absence of abuse is further evidenced by the acquiescence of all the parties in the propriety of the present proceedings as they went forward before EEOC. That agency treated the complaint of May 23, 1966 as a new complaint or renewal of an earlier one, not as an untimely effort to confer jurisdiction upon EEOC after the termination of earlier proceedings. Perhaps even more significantly, it was so treated by the State Commission itself. Furthermore, in the ensuing proceedings before EEOC, the Pullman Company also so treated it. It was only after EEOC had itself terminated the case initiated by the May 23, 1966 complaint and Love timely went to the District Court that the Pullman Company raised there the objection now accepted by our court.

It is apparent that the complaint of May 23, 1966 cannot be considered an abuse of the statutory scheme. This court nevertheless holds that EEOC's referral of this complaint to the State Commission was not compliance with § 706(b) (42 USCA § 2000e–5(b)). The court correctly observes that § 706(b) requires a complaint of employment discrimination to be filed before a state commission, if one exists, before it is to be considered by EEOC. To meet this requirement of the Act, EEOC adopted the practice of referring a charge, mistakenly filed initially with it, to the appropriate state agency, EEOC subsequently assuming jurisdiction.[1] The authority of EEOC to make such referrals

[1] G. C. Opin. 11/18/65 & 12/2/65; Comm. Dec. 12/30/65.

has been embodied in an amendment of Regulation § 1601.12 (F.R. Doc. 68–13553, eff. Nov. 7, 1968):

> The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the state or local agency pursuant to the provisions of § 706(b), and that unless the Commission is notified to the contrary, on the termination of state or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

This regulation was not in effect when EEOC referred Love's complaint to the State Commission, but, as indicated above, it merely formalized the earlier Commission procedure. That procedure, conforming to the statutory scheme, has been accepted, without being questioned, by the Third Circuit in *International Bhd. of Elec. Workers* v. *EEOC*, 398 F.2d 248 (3rd Cir. 1968). In that case, as in ours, a charge of discrimination was originally filed with EEOC, which referred the complaint to the state agency. The charging party never made a formal complaint directly to the state agency. The court nevertheless tacitly found compliance with § 706(b). EEOC had proceeded upon the original complaint after a subsequent request by the complaining party that it assume jurisdiction.

EEOC's past procedure and present regulations do not run counter to the policy of the Act. On the contrary, as the regulations state, "it is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the state and local agencies."[2] Yet, with no mention of the current regulations, the court rules inconsistently with them, and in my view thus unduly restricts the right of EEOC to entertain

[2] Reg. § 1601.12, *supra*.

and expedite claims for which it has responsibility under the Act to seek a solution. I think we should keep in mind that:

> we are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every "i" and cross every "t" on the way to the courthouse.[3]

The consistency of the EEOC procedure with the policy of the Act is emphasized by the facts of this case. The Colorado Commission, as a result of the 1963 and 1965 complaints, fully considered Love's complaint before EEOC was even aware of its existence. The State Commission had been unable to obtain an arrangement satisfactory to the parties, and, accordingly, terminated its proceedings. These unsuccessful efforts of the State Commission led Love to go to EEOC for relief. EEOC, in order to bring the matter within the statutory plan, that is, to enable the Colorado Commission to have the fullest opportunity to consider the complaint initially, referred it to that Commission. Because of the Colorado Commission's acquaintance with the Love grievance and with his dissatisfaction with the result of its efforts, it informed EEOC that it would waive jurisdiction over the matter. Only at this point did EEOC assume jurisdiction. I think it was entitled to do so, and that after the termination of its proceedings the District Court obtained jurisdiction by the timely filing of

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[3] *Antonopulos* v. *Aerojet-General Corp.*, 295 F.Supp. 1390, 5 (E. D. Cal. 1968).

suit by Love—that Love then came to the door of the court with quite valid credentials.[4] Accordingly, I respectfully dissent in appeal No. 209–69 from the court's affirmance of the District Court's order dismissing Love's complaint.[5]

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[4] I do not read *International Bhd. of Elec. Workers* v. *EEOC*, *supra*, as does the court. Moreover, it should be noted that *Washington* v. *Aerojet-General Corp.*, 282 F.Supp. 517 (C.D. Cal. 1968), also cited by the court, relied upon the case in the District Court which was reversed by the Third Circuit in the *IBEW* case, *supra*. See footnote 9, 282 F. Supp. at 522. And *EEOC* v. *Union Bank*, 408 F. 2d 867 (9th Cir. 1969), also cited, does not oppose the position I take; for there the matter seems never to have been before the State agency at all.

[5] The cross-appeal of the Pullman Company, before us in appeal No. 226–69, takes issue with the District Court's ruling that the proceedings before the Colorado Commission were validly reopened in 1965, a ruling with which this court agrees. It is unnecessary for me to take a position on this matter since in any event I conclude that the complaint of May 23, 1966, validly set in motion proceedings which led to the timely filing by Love of his complaint in the District Court which in my opinion gave that court jurisdiction.

APPENDIX B

United States Court of Appeals
Tenth Circuit

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENORS

United States Court of Appeals
Tenth Circuit

No. 209–69—JULY 1970 TERM

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENORS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (DISTRICT COURT NO. C-899)

OPINION ON REHEARING

Hugh J. McClearn, Denver, Colorado (Van Cise, Freeman, Tooley & McClearn, Denver, Colorado, with him on the Brief), for Appellant, Earl A. Love.

Edward C. Eppich, Denver, Colorado (Neef, Swanson and Myer, Denver, Colorado, with him on the Brief), for Appellee, The Pullman Company.

Benjamin W. Mintz, Attorney, Department of Justice, Washington, D.C. (Stephen P. Passek, Attorney, Department of Justice, Washington, D.C., and James L. Treece, United States Attorney, with him on the Brief), for Intervenor, United States of America.

Russell Specter, Acting General Counsel, Washington, D.C. (Marian Halley, Attorney, with him on the Brief), for Intervenor, Equal Employment Opportunity Commission.

Before LEWIS, *Chief Judge,* FAHY, *Senior Circuit Judge**, and SETH, *Circuit Judge.*

SETH, *Circuit Judge.*

OPINION ON REHEARING

The Equal Employment Opportunity Commission argues for the first time on this rehearing the relationship of the effective date of Title VII of the Civil

*Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

Rights Act of 1964 to the procedural and jurisdictional events. Title VII became effective on July 2, 1965, which was a date during which the Colorado Civil Rights Commission was attempting to provide some relief or remedy for the appellant. The record shows that the Commission discussed the complaint with The Pullman Company and advised Love that he could be promoted to the position of conductor, but under the existing Union contracts, his seniority as a conductor would be so low that he probably would be laid off. This was not a satisfactory prospect for appellant. This date, July 30, 1965, was determined by the trial court to be the termination date by the State authorities, and thus appellant's time for application for relief to the EEOC then began to run.

The EEOC on this rehearing now urges that the pre-July 2, 1965, event be disregarded as being ineffective as antedating Title VII. We agree with this position, but it does not materially alter the consideration of the events.

The termination by the Colorado Commission on July 30, 1965, could only have been of proceedings which related to events, conditions, or acts which took place before the effective date of the Act, and insofar as these asserted acts of discrimination they could not have been within the jurisdiction of the EEOC. Crosslin v. Mountain States Telephone & Telegraph Co., 38 U.S.L. Week 2514, —— F. 2d —— (9th Cir.); Nishiyama v. North American Rockwell Corp., U.S. D.C., Cent. Dis. Calif., #68-1423-AAH; Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C.); Dobbins v. Local 212, Int'l Bhd. of Elec. Workers, 292 F. Supp. 413 (S.D. Ohio); Banks v. Local Union 136, Int'l Bhd. of Elec. Workers, 296 F. Supp. 1188 (N.D. Ala.).

Thus the first post effective date that events could have been considered under the record before us were those referred to in the letter of complaint of May 23, 1966, sent by appellant directly to the EEOC. This was the letter the Commission did not file but suspended until the Colorado Commission was advised and a reply received on June 1, 1966. Then according to the arguments and briefs of the EEOC it "* * * automatically accepted the charge for filing." This determination of the time for filing was made by the Commission without further correspondence from the appellant as apparently later became the procedure, as described in the prior opinion of this court. International Bhd. of Elec. Workers v. United States Equal Employment Opportunity Comm'n, 398 F. 2d 248 (3d Cir.).

The regulations of the Commission did not contemplate or permit such a manipulation of the filing date, and it is contrary to uniform practice before Governmental agencies. We are strongly urged to consider regulations adopted at a later date, but this cannot be done, even if the method could be regularized by the adoption of regulations.

It must be pointed out that if complaints of this nature are so received by the EEOC but not "filed" until a reply is received from a State agency or until sixty days have elapsed, it is entirely possible and even likely that the time for appeal of the person complaining may have elapsed by reason of prior termination by State authorities. Under these circumstances, the EEOC to save the appeal would have to "file" the complaint at a date much earlier than the day on which the situation became known to it. The post-date filings made "automatically" by the EEOC as described on this appeal have little to recommend

them over, pre-dating the "filings" to a date before the day such act was accomplished.

The EEOC here argues that it need only advise the State agency of the complaint. In its brief it states that section 706(b) "* * * requires only that a state agency be given notice of the claim and 60 days in which to deal with it before the EEOC may assume jurisdiction over the case * * *," and elsewhere that the requirements are met if it "* * * informs the state agency of the pendency of a charge * * *." This without further word or act by the complainant to permit the EEOC to then "automatically" assert jurisdiction after sixty days does not comply with the Act as described in the prior opinion.

The action of the trial court in treating appellee's motion as one for summary judgment and the granting of the motion is affirmed for the reasons stated in this opinion on rehearing and as set forth in the prior opinion.

Affirmed.

LEWIS, *Chief Judge*, concurring.

I concur in the affirmance of this judgment on its record facts for to do otherwise would give judicial approval to administrative "flexible" filing to obtain, postpone, or reject jurisdiction. Admittedly those persons seeking relief under the Act are usually uninformed as to procedural necessities, often present their problem in letter form and directly to the Commission, and so need regulatory or legislative protection to preserve their basic rights against unnecessary procedural bars. But this problem is not unique with this Commission and its solution certainly does not lie in the approval of the manipulated procedures reflected in this record. To do so, migl.t well, under different facts, penalize compliance as well as reward noncompliance with the requirements of the Act.

FAHY, *Senior Circuit Judge, Dissenting.*

With a modification to be mentioned I adhere to the views expressed in my dissenting opinion filed September 22, 1969. In light of the fact that Title VII of the Civil Rights Act of 1964 did not become effective until July 2, 1965, I agree with the opinion of the court on rehearing that the correct basis for deciding that the Equal Employment Opportunity Commission did not have jurisdiction of the reopened 1965 case is that the conduct complained of occurred prior to July 2, 1965, rather than as stated in my dissent of September 22, 1969.

APPENDIX C

United States Court of Appeals
Tenth Circuit

SEPTEMBER TERM, SEPTEMBER 22, 1969

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE.

Before Honorable David T. Lewis, Honorable Charles Fahy and Honorable Oliver Seth.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. Honorable Charles Fahy dissents.

WILLIAM L. WHITTAKER,
Clerk,

By RUTH H. JACOBSON,
Deputy Clerk.

APPENDIX D

United States Court of Appeals
Tenth Circuit

JULY TERM—JULY 30, 1970

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENORS

Before Honorable David T. Lewis, Chief Judge; and Honorable Charles Fahy, Senior Circuit Judge; and Honorable Oliver Seth, Circuit Judges

This cause came on to be heard on rehearing, and was argued by counsel. Upon consideration whereof, it is ordered that the judgment of the United States District Court for the District of Colorado is affirmed. Lewis, Chief Judge, specially concurring; Fahy, Senior Circuit Judge, dissenting.

WILLIAM L. WHITTAKER, *Clerk,*
HELEN R. BARTHA, *Deputy Clerk.*

APPENDIX E

United States District Court
District of Colorado

Civil No. C–899

EARL A. LOVE, PLAINTIFF

v.

PULLMAN COMPANY, DEFENDANT

February 28, 1969

Hugh J. McClearn, Denver, Colorado, for Plaintiff.

Edward C. Eppich, Denver, Colorado, for Defendant.

ARRAJ Ch. J.: The plaintiff's action is based upon the provisions of 43 USCA, Section 2000–e–5 et seq., commonly referred to as Title VII of the Civil Rights Act of 1964. The plaintiff alleges that he has been employed by the defendant for a number of years as a porter, and for the last several years he has been performing the duties and responsibilities of the porter-in-charge, which are commensurate with the duties and responsibilities of a Pullman conductor, yet he received lower wages due to his race.

The defendant has moved to dismiss the action on the grounds that the court lacks jurisdiction over the subject matter and that the plantiff's cause of action has become moot. The defendant's motion is supported by the deposition of James Reynolds, Director of the Colorado Civil Rights Commission, together with the exhibits attached thereto. The record also contains facts which have been stipulated to by counsel for the

parties. Accordingly, the motion to dismiss filed by the defendant will be treated as a motion for summary judgment.

Before an action may be commenced under Title VII of the Civil Rights Act of 1964, 42 USCA, § 2000–e–5 et seq., there are certain statutory prerequisites which must be met before this court has jurisdiction over the subject matter of this type of action.

It is apparent from 42 USCA, § 2000–e–5(b), that if a state has a statute which prohibits the alleged unlawful employment practice, that no charge may be filed under the Civil Rights Act of 1964 with the EEOC until after proceedings have been commenced under the state law. The State of Colorado has such a statute (CRS 1963 80–21–1 et seq.) which has been in effect since 1957 and prohibits the type of employment practice alleged by Mr. Love. The Colorado statute (CRS 1963 81–21–7(1)) requires the filing of a written complaint with the Colorado Civil Rights Commission to commence proceedings there. The Colorado statute is recognized by the EEOC as a state law which requires deferral of the EEOC action under 42 USCA, § 2000–e–5(b).

The record before the court shows that in 1963 the plaintiff did file a written complaint with the Colorado Civil Rights Commission, but apparently this claim was not resolved, at least to the plaintiff's satisfaction. Thereafter, in the summer of 1965, the plaintiff again went to the Colorado Civil Rights Commission and restated his complaint to the Commission, but no written complaint was filed at that time; however, Mr. Reynolds, the director and head of the Colorado Civil Rights Commission, did contact the defendant who stated they would promote Mr. Love to the position of a conductor, but that he would probably be laid off because of the seniority

rules in effect. On July 30, 1965, the Colorado Civil Rights Commission so advised Mr. Love by letter.

It is the court's opinion that since Colorado has a state law prohibiting the discrimination alleged by the plaintiff and providing a remedy for such discrimination, that the language of 42 USCA, § 2000–e–5(b) requires that an aggrieved person exhaust his remedies through the state machinery before the EEOC and this court are conferred with jurisdiction over the subject matter. Although the plaintiff did not file a written complaint in 1965 with the Colorado Commission, he did file such a complaint in 1963. It is the court's opinion that the Colorado Civil Rights Commission treated the oral complaint in 1965 as a reopening of the 1963 matter, and that although there wasn't literal compliance with the wording of the statute there was substantial compliance. Accordingly, the court holds that the plaintiff's failure to file a written complaint in 1965 does not oust this court of jurisdiction.

42 USCA, § 2000-e-5(d) states inter alia: "In the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in sub-section (b) of this section, such charge shall be filed by the person aggrieved within 210 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . ."

The Civil Rights Commission of the State of Colorado terminated its proceeding on July 30, 1965, and so notified Mr. Love. No further contact was had by Mr. Love with the State Commission. He filed his complaint with the EEOC on May 23, 1966.

It is the court's opinion that the state proceedings were effectively terminated on July 30, 1965, and that the plaintiff's period within which to file a complaint with the EEOC commenced on July 31, 1965. As Mr. Love did not file with the EEOC until May 23, 1966, it is the court's conclusion that the charge and complaint before the EEOC was not filed within the time required by 42 USCA, § 2000-e-5(d), and that the EEOC did not have jurisdiction to consider Mr. Love's charge. As Mr. Love's charge was not timely filed with that body, this court is also without jurisdiction to hear the complaint herein.

Furthermore, as to the plaintiff's claim for injunctive relief, it is obvious that inasmuch as the plaintiff has resigned his position with the defendant, which fact is admitted by the plaintiff, then the request for injunctive relief is moot.

There is no genuine issue of material fact, and the court as a matter of law concludes that the defendant's motion should be granted.

It is, therefore, Ordered that judgment be, and the same is, hereby granted in favor of the defendant, The Pullman Company, and that the judgment of dismissal of this action shall be entered forthwith.

U.S. GOVERNMENT PRINTING OFFICE: 1970